In the

Supreme Court of the United States

No. [redacted] 184

DON W. WHITE; B. C. THOMSON and ALVIN HANSON, d b a. KLISAP AUTOMATIC DISPENSER CO.; E. M. HIGGINS, WM. J. HIGGINS, PETER S. HIGGINS and DALE FISHER, d b a AUTOMATIC MERCHANDISERS; SEACARB OF THE NORTHWEST, INC., a Washington corporation; ORIE A. SMALL and JAMES P. WORDEN, JR., d b a PACIFIC AUTOMATIC; FRANK RUSSO, d b a EVERGREEN BEVERAGE CO.; C. J. CLAUSEN, JR., d b a INLAND VENDING SERVICE; CARTER W. DULLANTY and GEORGE K. LINDBERG, d b a BEVERAGE VENDING SERVICE COMPANY; AUTOMAT CO., INC., a Washington corporation; JOHN NECHANICKY and VIT NECHANICKY, d b a CANTEEN COMPANY OF WASHINGTON; RICHARD P. NECHANICKY, d b a AUTOMATIC CANTEEN CO. OF SPOKANE, *Appellants*,

vs.

THE STATE OF WASHINGTON, *Appellee*.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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THE ARGUS PRESS, SEATTLE

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No. 1079

DON W. WHITE; B. C. THOMSON and ALVIN HANSON, d/b/a KITSAP AUTOMATIC DISPENSER CO.; F. M. HIGGINS, WM. J. HIGGINS, PETER S. HIGGINS and DALE FISHER, d/b/a AUTOMATIC MERCHANDISERS; SPACARB OF THE NORTHWEST, INC., a Washington corporation; ORIE A. SMALL and JAMES P. WORDEN, JR., d/b/a PACIFIC AUTOMATIC; FRANK RUSSO, d/b/a EVERGREEN BEVERAGE CO.; C. J. CLAUSEN, JR., d/b/a INLAND VENDING SERVICE; CARTER W. DULLANTY and GEORGE K. LINDBERG, d/b/a BEVERAGE VENDING SERVICE COMPANY; AUTOMAT CO., INC., a Washington corporation; JOHN NECHANICKY and VIT NECHANICKY, d/b/a CANTEEN COMPANY OF WASHINGTON; RICHARD P. NECHANICKY, d/b/a AUTOMATIC CANTEEN CO. OF SPOKANE, *Appellants*,

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I.

COUNTER-STATEMENT OF THE CASE

Before answering the argument of appellee in support of its Motion to Dismiss or Affirm, it is logical to

dispose of any implication which may be in its brief that appellants have made erroneous statements concerning who pays the Washington Retail Sales Tax and on whom this tax is imposed. In the Jurisdictional Statement appellants stated that the Retail Sales Tax Law of the State of Washington imposes a tax collected from appellants on their sales, all of which were for thirteen cents (13¢) or less, without such a tax being collected from sellers of merchandise for fourteen cents (14¢) or more, and that the effect of this law as interpreted by the Supreme Court of the State of Washington is to impose upon sellers of merchandise at retail for amounts between one cent (1¢) and thirteen cents (13¢) a three per cent (3%) tax on the gross amount of such sales, while no such or similar tax is imposed on other sellers. In its Motion to Dismiss or Affirm, appellee says this is not so and that contrary to appellants' assertions, all sellers are required to pay tax to the state in an amount determined by multiplying their total gross sales by the rate (3%) of the tax.

The constitutionality of tax measures is not decided upon niceties of language or by considering only the entity which ultimately makes the remittance to the taxing authority, here the sellers.

> "... The descriptive pigeonhole into which a state court puts a tax is of no moment in determining the constitutional significance of the exaction. 'In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect.' *Henderson v. New York* (*Henderson v. Wickham*) 92 U.S. 259, 268, 23 L.ed. 543, 547. Such has been the repeated import of the

cases which only recently were well summarized by the guiding formulation for adjudicating a tax measure, that 'in passing on its constitutionality we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it.' *Lawrence v. State Tax Commission,* 286 U.S. 276, 280, 76 L.ed. 1102, 1105, 52 S.Ct. 556, 87 A.L.R. 374." *Wisconsin v. J. C. Penney Co.* (1941) 311 U.S. 435, 443, 61 S.Ct. 246, 85 L.ed. 267, 270.

"... It hardly is necessary to repeat that when this court is called upon to test a state tax by the provisions of the Constitution of the United States, our decision must depend not upon the form of the taxing scheme, or any characterization of it adopted by the state, but rather *upon the practical operation and effect of the tax as applied and enforced.*" *Wagner v. Covington* (1919) 251 U.S. 95, 102, 40 S.Ct. 93, 64 L.ed. 157, 167. (Emphasis added)

"In passing on the constitutionality of a tax law 'we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it.' *Lawrence v. State Tax Commission,* 286 U.S. 276, 280, 76 L.ed. 1102, 1105, 52 S.Ct. 556, 87 A.L.R. 374 ..." *Nelson v. Sears, Roebuck & Co.* (1941) 312 U.S. 359, 363, 61 S.Ct. 586, 85 L.ed. 888, 891.

There can be no dispute concerning the practical operation and effect of the Washington Retail Sales Tax as applied and enforced under the statute, the regulations issued pursuant thereto and the Washington Supreme Court interpretation thereof. It is acknowledged that the Washington court has held that all sellers must remit three per cent (3%) of their total gross

sales to the state as tax. The appellee makes this statement as if it automatically decides the constitutional issue now before this court. However, this remittance requirement tells only half the story, the remainder is the important part, the practical operation of the Washington Retail Sales Tax Law.

The statute provides that "There is levied and there shall be collected a tax on each retail sale . . ." RCW 82.08.020. The duty of paying the tax is upon the buyer, and the seller is required to collect the tax from the buyer. RCW 82.08.050. The seller is prohibited from in any way absorbing the tax,* RCW 82.08.120, although he must nevertheless remit three per cent (3%) of his gross sales, Washington Supreme Court Decision (R. 75). The schedule by which collections are made by the seller from the buyer is established by a ruling of the Washington Tax Commission (Juris. St. 33) and is such that the seller is prohibited from collecting on sales for amounts between one cent (1¢) and thirteen cents (13¢), inclusive. The Washington Supreme Court has now held that sellers must remit to the state as and for the retail sales tax three per cent (3%) of all sales made without regard to this statutory prohibition and this holding is conclusive here. Thus

*The fact that appellants are vending machine operators has nothing to do with the question now before the court; it is completely immaterial. The discrimination of which appellants complain is based on the selling price of merchandise. It applies whether or not the sale is through a vending machine; no seller can collect the tax from his buyer on a sale for less than fourteen cents (14¢). RCW 82.08.080 gives a vending machine operator authority to absorb a tax which he would otherwise collect from a buyer when there has been appropriate administrative application and action. However, no such application or action has taken place as to appellants nor does this statutory authorization have any effect on one cent (1¢)—thirteen cents (13¢) sales; collection from buyers in these low-priced transactions is prohibited in any event.

it is clear that the natural and reasonable effect and the practical operation of the Washington Retail Sales Tax Law is that sellers of merchandise for amounts between one cent (1¢) and thirteen cents (13¢), inclusive, must pay the tax themselves, whereas sellers of merchandise for amounts of fourteen cents (14¢) and more do not, unless of course they fail to fulfill the statutory requirement that they collect it from their buyers.

Viewing the situation by the well-established rule that the constitutionality of a tax is to be determined by considering the practical operation of the tax measure, we resubmit that the effect of the statute involved as interpreted by the Supreme Court of the State of Washington is to impose upon sellers of merchandise at retail for amounts between one cent (1¢) and thirteen cents (13¢) a three per cent (3%) tax on the gross amount of such sales, while no such or similar tax is imposed on other sellers.

II.

ARGUMENT

Appellee's Motion to Dismiss or Affirm is made pursuant to paragraph 1 of Rule 16 of the Revised Rules of the Supreme Court of the United States. The motion to dismiss comes under subparagraph (b) of that rule and concerns "a substantial federal question." The motion to affirm comes under subparagraph (c) and refers to unsubstantial questions. It is obvious that a federal question is involved, and appellee does not claim otherwise. Consequently the only issue under both of appellee's motions is whether or not a "sub-

stantial" question is presented by appellants. Therefore, both motions may be argued as one. If a substantial question is presented, both motions should be denied; if it is not, both motions should be granted.

Appellee's argument is that its motion is well taken for the general reason that a number of state courts have upheld the constitutionality of a sales tax, and for the specific reasons that (a) there is no classification to which appellants can object because the effects of which appellants complain are "entirely the result of appellants' chosen methods of doing business" (Appellee's motion, page 10) and (b) if there is a classification, it is one founded on reasonable considerations of tax policies.

However, the mere fact that the same constitutional issue which appellants are raising in this case has heretofore been raised in a number of states in itself indicates that a substantial question exists. A majority of the cases arose in states where the sales tax is imposed directly on the seller, but the other cases are entitled to more weight since they involve a tax upon the buyer, which is the situation in the State of Washington. Appellee apparently contends that all of the cases uphold the constitutionality of the sales tax statutes involved, claiming that the statements directly contra to appellee's position in *Winslow-Spacarb, Inc. v. Evatt, Tax Commissioner* (1945) 144 Ohio 471, 59 N.E.(2d) 824, are dicta. The pertinent paragraph in this case is:

> "It is always the duty of a court to construe a statute, if possible, in a manner to give it a constitutional operation. In accordance with such rule Section 5546-12a, General Code, should be inter-

preted as excluding a vendor wholly engaged in the making of separate sales of a commodity at a price less than nine cents per unit, such sales not being taxable under the express terms of Section 5546-2, General Code. If Section 5546-12a were to be applied to such a vendor who collects no tax from the consumer, the vendor would be paying three per cent on his gross retail sales entirely out of his own pocket, while other vendors in the same vicinity, selling similar and other commodities, some of their sales being taxable and others not, would have the privilege and advantage of deducting 'the amount of tax paid to the state by means of canceling prepaid tax receipts' for which expenditure they have been reimbursed by the consumer, thus placing them in a more favored position and in some instances, at least, causing them to pay little or nothing. The result would be an unfair discrimination among vendors, in violation of the equal protection clauses of Section 2, Article I of the Constitution of Ohio and the 14th Amendment to the Constitution of the United States." *Winslow-Spacarb, Inc. v. Evatt, Tax Commissioner* (1945) 144 Ohio 471, 59 N.E.(2d) 824, 826.

We submit that it does not constitute dicta but is an authoritative opinion of the highest court of the State of Ohio. The Ohio Supreme Court was setting forth one of its reasons for holding that sellers of small-priced merchandise did not have to pay the Ohio sales tax: if it should interpret the statute otherwise, the statute would be unconstitutional because it would then impose a tax upon sellers of merchandise for small amounts while no such or similar tax would be imposed on other sellers. This is an opinion of the highest tri-

bunal of a state directly supporting appellants' contention in this case.

One other state, where the burden of the tax is primarily on the buyer, has a decision indicating that its highest tribunal would in all probability come to the same conclusion as the Ohio Supreme Court. In *Mouledoux v. Maestri* (1941) 197 La. 525, 2 So.(2d) 11, a seller located in the City of New Orleans claimed that an ordinance very similar to the Washington Retail Sales Tax Law violated the uniformity provisions of the Louisiana State Constitution because, among other things, he was required to return a stated percentage of his gross sales as tax. The court held that there was no constitutional violation and in doing so specifically stated that the seller "is required to report only the actual taxes collected, regardless of the percentage of those taxes to his gross receipts. . . . In order to make this doubly clear, the amendatory ordinance adopted by the Commission Council indubitably required the dealer to report only the tax actually collected by him from the purchaser, user or consumer. Proof in the record shows that this was being carried out in the practical application of the provisions of the ordinance under attack." 2 So.(2d) p. 22. Thus, although there is no statement in the case to the effect that if a seller had been required to remit a percentage of his gross receipts there would be an unconstitutional violation, the clear implication is that the Louisiana court would so hold.

It is not surprising that the legal battle, extending from 1936 to 1956, over the imposition of state sales taxes upon sellers of low-priced merchandise without

imposing the tax on sellers of higher-priced merchandise has in the majority of instances been decided in favor of the taxing authority since only state courts have had these taxing measures under consideration. However, there is a respectable minority. Also, it must be remembered that our federal constitution provides that the ultimate authority over such controversies between individual taxpayers and taxing states is the United States Supreme Court which has always been solicitous of the plight of the individual in such matters, and no federal court has ever passed upon the point. It is to be expected that the same issue will arise continuously in the future until it is decided by the highest federal tribunal. We believe that the time has come for the federal constitutional questions involved to be decided by the United States Supreme Court. It is submitted that not only does the fact that the issue has arisen in a number of state courts show that a substantial question exists, but that this court should, in any event, decide this vexing problem now.

A. Existence of Classification

Appellee apparently contends that no classification at all exists, that the Washington Retail Sales Tax has no different effect upon sellers of 1¢-13¢ priced articles and sellers of higher-priced merchandise, that the tax measure does not place sellers of low-priced merchandise in a different classification from other sellers, because the collection schedule applies to each and every retailer and that the discriminatory effects to which appellants object are merely the result of appellants voluntarily doing business in a certain manner.

It is submitted that this attitude ignores the realities of the situation and the stipulated facts. Appellants, as sellers of merchandise for amounts between one cent (1¢) and thirteen cents (13¢), inclusive, have paid the retail sales tax out of their own pockets, with any chance for reimbursement by their buyers prohibited by the statute and the rule establishing the bracket system. However, sellers of merchandise for amounts of fourteen cents (14¢) and over are reimbursed by their buyers for the tax which they pay and, in fact, are required by the statute to secure reimbursement. Obviously, this difference in the incidence of the tax is a classification; sellers of low-priced merchandise have the tax burden placed upon them, whereas sellers of other priced merchandise do not.

Even though the collection schedule by its terms applies to every Washington seller, the requirements that each seller pay three per cent (3%) of his gross sales to the state and that each seller collect the tax from his buyer unless the sale is for an amount between one cent (1¢) and thirteen cents (13¢) in which event the seller is prohibited from collecting the tax from his buyer, have the practical effect of shifting the incidence of the Washington Retail Sales Tax from buyers to sellers where sales of the low-priced merchandise are involved. To say that no difference exists in the effect of the law upon sellers of merchandise above and below the thirteen cent-fourteen cent (13¢-14¢) line ignores the practical operation and effect of the tax measure which is really the essential consideration.

Appellee contends this discriminatory practical classification is immaterial by saying that it does not result from the statute but from appellants so conducting their business as to be hurt by it, and if appellants do not want this result they should conduct some other business. Supposedly such a statement could be said about any unconstitutional tax: it is not the taxing statute which does the harm, but the taxpayer so conducting his business as to come within its unconstitutional clutches. Such an attitude would render the Constitution a nullity. Certainly, all taxpayers are entitled to the protection afforded by the Fourteenth Amendment to the business which they are conducting. Constitutional provisions are to be applied to situations as they exist. The constitutionality of specific taxation is determined by the practical effect it has upon existing conditions, not by what effect it might have if the taxpayer changed his business.

The point is perhaps best brought out by examining some of the equal protection cases decided by this court:

Stewart Dry Goods Co. v. Lewis (1935) 294 U.S. 550, 55 S.Ct. 525, 79 L.ed. 1054, involved a case where the State of Kentucky was enjoined from imposing a gross sales tax wherein the rate of return increased within established brackets. It could have been argued that the Kentucky collection schedule applied uniformly to every seller in the State of Kentucky and that the particular effects upon specific sellers was simply the result of their chosen method of doing business, just as appellee does at page 10 of its motion. This court held, however, that the Kentucky Act taxed sales in an unequal and arbitrary way, classifying them for

the imposition of different rates without reference to any real or substantial distinction, and held the tax unconstitutional.

Quaker City Cab Co. v. Pennsylvania (1928) 277 U.S. 389, 48 S.Ct. 553, 72 L.ed. 927, involved a Pennsylvania tax upon the gross receipts of transportation companies, the tax being levied upon corporations but not upon individuals or partnerships. Again the argument could have been made that the discriminatory effect upon the taxpayer resulted simply from the choice of doing business as a corporation. Such an argument would not have made any more sense in the Pennsylvania case than it does in this one.

Hartford Steam Boiler Inspection and Insurance Company v. Harrison (1937) 301 U.S. 459, 57 S.Ct. 838, 81 L.ed. 1223, involved a statute which provided that a salaried employee could not be a licensed agent of any type of insurance company except a mutual insurance company. If the argument made by appellee in the case at bar were applied to the *Hartford* case, the appellee would say that there was no discrimination since the statute applied to all insurance companies and Hartford could change its method of doing business and appoint an agent who was not a salaried employee if it wanted to avoid the effect of the law. Of course, no such argument was made, or at least it was not mentioned in the decision holding the statute unconstitutional as a violation of the equal protection clause.

Louisville Gas & Electric Co. v. Coleman (1928) 277 U.S. 32, 48 S.Ct. 423, 72 L.ed. 770, involved the constitutionality of a tax on mortgages which shall be lodged for record "where the indebtedness does not mature within five years . . ." It is to be noted

> that this tax applied to every mortgagor in the State of Kentucky just as the Washington collection schedule applies to every seller. Also its particular effect depended entirely upon whether a mortgagor took a mortgage maturing in more or less than five years, just as the particular effect of the Washington tax measure depends entirely upon whether a retailer sells for thirteen cents (13¢) or fourteen cents (14¢). Any particular mortgagor could avoid the tax by taking only mortgages maturing within five years, just as any particular Washington seller can avoid the tax here involved by selling higher priced items. This court did not tell the taxpayer that there was no constitutional violation because if it wished it could limit its mortgages to five-year maturity periods, but held that a classification existed and was arbitrary and, therefore, that the statute was unconstitutional.

The practical effect of the Washington Retail Sales Tax upon sellers of merchandise for one cent (1¢) to thirteen cents (13¢), inclusive, is so drastically different from that upon other sellers that it seems to us that there is no question but that the statute creates a distinctive classification of sellers. The tax is imposed on each retail sale. RCW 82.08.020. Each time a sale is made for fourteen cents (14¢) and over the seller thereof is required to collect the tax. RCW 82.08.050 and Ruling of the Washington Tax Commission Relative to the Bracket System. Each time a sale is made for less than fourteen cents (14¢), the seller is prohibited from collecting the tax. Ruling of the Washington Tax Commission Relative to the Bracket System. Both types of sellers are required to pay an amount equiva-

lent to three per cent (3%) of their gross sales to the state as tax. Opinion of the Washington Supreme Court (R. 75). This certainly creates a different effect upon sellers, depending upon whether their sales are one side or the other of the 13¢-14¢ line. The tax incidence is upon the seller when he sells merchandise at less than fourteen cents (14¢), whereas the tax incidence is on the buyer when the seller sells merchandise at fourteen cents (14¢) or more. Surely as a practical matter this taxing method creates a classification.

B. Reasonableness of Classification

In the last part of appellee's argument supporting the Motion to Dismiss or Affirm, the contention is made that the classification, if one exists, is reasonable so as to be a difference permitted by the equal protection clause of the Fourteenth Amendment. Appellee points out that the Constitution does not impose a rigid rule of equality of taxation upon a state, and this is readily acknowledged. However, appellee then takes the position that the collection schedule is reasonable because of administrative convenience and expense in the collection and measurement of the Washington Retail Sales Tax, and that this administrative convenience and expense is itself a sufficient justification for the different tax treatment imposed upon those who sell low-priced merchandise and those who sell high-priced articles. Appellants' position is that the reasonableness of collecting a retail sales tax *from buyers* in accordance with a bracket system such as that existing in Washington, does not justify shifting the burden of

the tax from buyers to a class of sellers selling 1¢-13¢ articles when there is no such shift to other sellers.

It is reasonable for a collection schedule to have a minimum below which no tax is collected. However, this does not justify shifting the tax burden. It does not do so in a number of states. In Florida, Maryland, Louisiana and West Virginia no one, buyer or seller, pays any sales tax on sales for small amounts ranging from 1¢-5¢ to 1¢-50¢, and in Maine, Connecticut and North Carolina partial relief is provided to those who sell articles at prices below the minimum of the applicable collection schedule. The sales tax laws of these states work well and the same could easily be done in Washington.

Even though exact equality is not attained by collecting the retail sales tax from buyers under a bracket system because of the breakage at the extremes of each bracket in the schedule, this inequality does not cause a tax measure to be unconstitutional. It is the type of administrative convenience and expense justifying a difference in tax treatment referred to in *Carmichael v. Southern Coal & Coke Co.* (1937) 301 U.S. 495, 57 S.Ct. 868, 81 L.ed. 1245, and *Madden v. Kentucky* (1940) 309 U.S. 83, 60 S.Ct. 406, 84 L.ed. 590. In the *Carmichael* case the constitutionality of an unemployment compensation tax statute was challenged because, among other things, it exempted employers of less than eight employees from the tax while imposing the tax on other employers. The law was held to be constitutional, but note that no shift in the tax burden was involved. If the statute had imposed the tax on employers of eight or

more employees and had shifted the tax to the employees when the employer had less than eight employees, we believe that this court would have had no hesitancy in declaring that such a shift in the incidence of the tax violated the equal protection clause as far as the taxed employees were concerned since employees of other employers would not be taxed. It is a similar shift of the tax burden which appellants claim causes the tax involved in the case at bar to be unconstitutional.

The statements in the *Carmichael* and *Madden* cases are perhaps more fully expressed in the following words from *Fernandez v. Wiener* (1945) 326 U.S. 340, 66 S.Ct. 178, 90 L.ed. 116,

> "Considerations of practical administrative convenience and cost in the administration of tax laws afford adequate grounds for imposing a tax on a well recognized and defined class, without attempting to extend it so as to embrace the penumbra of special and more or less casual interests which in each case may or may not resemble the tax class." 326 U.S. 360, 90 L.ed. 133.

Actually the cases referring to administrative convenience and cost of collection are only integrating the rule that strict equality of taxation is not necessary and the rule that a classification of taxpayers must be based on a real and substantial difference having a reasonable relation to the subject of the legislation. The constitutional objection to the tax measure now before the court is not that the classification of sellers into those selling merchandise above and those selling below the 13¢-14¢ line may involve instances of inequality in the administration of the tax, but that the classifica-

tion itself bears no reasonable relationship to the purpose of the legislation, to-wit, that of raising revenue. The situation is not unlike that in *Louisville Gas & Electric Co. v. Coleman* (1928) 277 U.S. 32, 48 S.Ct. 423, 72 L.ed. 770, where, in holding a tax on recorded mortgages not maturing within five years to be unconstittuional, the court said:

> "The application of the equal protection clause does not depend upon what name is given to the tax. Whether the tax now in question be called a privilege tax or a property tax, it falls in effect upon one indebtedness and not upon another where the sum of each is the same, where both are incurred by corporations or both by natural persons, where the percentage of interest to be paid is the same; where the mortgage security is identical in all respects; where, in short, the only difference well may be that one is payable in sixty months, and the other in fifty-nine months. No doubt the state may take into consideration as an element in fixing the amount of the tax the time within which the indebtedness is to be paid; for, since the tax is a flat sum covering the entire life of the lien, the privilege of recording the short-time lien and that of recording the long-time lien have different taxable values. But classification good for one purpose may be bad for another; and it does not follow that because the state may classify for the purpose of proportioning the tax, it may adopt the same classification to the end that some shall bear a burden of taxation from which others under circumstances identical in all respects save in respect of the matter of value, are entirely exempt." 277 U.S. 38, 72 L.ed. 774.

Appellants recognize that the unconstitutionality of

the Washington Retail Sales Tax is not without doubt. Neither appellants nor appellee would be before this Court if the question was clear either way. One of the difficulties is inherent in the issue itself since

> "the equal protection clause . . . is not susceptible of exact delimitation. No definite rule . . . which automatically will solve the question in specific instances, can be formulated." *Louisville Gas & Electric Co. v. Coleman* (1928) 277 U.S. 32, 37, 48 S.Ct. 423, 72 L.ed. 770, 773.

However, it does seem quite clear that a substantial question is presented when appellants submit that, although the bracket system set up by the Washington Tax Commission may be a reasonable method for collecting the retail sales tax from buyers, there does not exist a real and substantial difference having a reasonable relation to the raising of revenue between sellers of merchandise for one cent (1¢) to thirteen cents (13¢), inclusive, and sellers of merchandise for fourteen cents (14¢) and more which justifies requiring all sellers to pay three per cent (3%) of their gross sales to the state thus shifting the burden of the Washington Retail Sales Tax from buyers to those who sell merchandise at prices below an arbitrary line drawn at fourteen cents (14¢).

III.
SUMMARY

The invalidity of appellee's motion is highlighted by applying the ideas expressed in *Stebbins v. Riley* (1925) 268 U.S. 137, 45 S.Ct. 424, 69 L.ed. 884, to the situation. In the *Stebbins* case an inheritance tax act of the State of California was attacked as unconstitutional. During the course of the opinion, it was said:

> "The taxing statute may . . . make a classification for purposes of fixing the amount or incidence of the tax, provided only that all persons subjected to such legislation within the classification are treated with equality, and provided further that the classification itself be rested upon some ground of difference having a fair and substantial relation to the object of the legislation." 268 U.S. 142, 69 L.ed. 888.

If there is no classification involved here as appellee contends and the Washington Retail Sales Tax applies uniformly to every seller in the State of Washington, all such sellers are certainly not treated with equality. Clearly a highly inequitable situation exists under which sellers of tangible personal property at retail for amounts between one cent (1¢) and thirteen cents (13¢), inclusive, bear the incidence of the retail sales tax whereas other sellers of tangible personal property at retail do not. On the other hand, if sellers of one cent-thirteen cents (1¢-13¢) merchandise are separately classified, then whether the classification bears a reasonable relation to the production of revenue is certainly a substantial question.

It follows that appellee's Motion to Dismiss or Affirm is without merit and should be denied.

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